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# in the Supreme Court of the United States

OCTOBER TERM, 1970

70-47

No. [redacted] 1970

FLORENCE DIFFENDERFER and NISHAN PAUL,
*Appellants,*

*vs.*

CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INCORPORATED, a non-profit Florida corporation; DADE COUNTY, FLORIDA, a political subdivision of the State of Florida; PORTER W. HOMER, County Manager; R. K. OVERSTREET, Tax Collector of Metropolitan Dade County, Florida; and FRED O. DICKINSON, JR., as Comptroller of the State of Florida,

*Appellees.*

**On Appeal from the United States District Court for the Southern District of Florida**

## APPELLANT'S BRIEF ON THE MERITS

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## No. 1042-OT

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FLORENCE DIFFENDERFER and NISHAN PAUL,
*Appellants,*

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CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INCORPORATED, a non-profit Florida corporation; DADE COUNTY, FLORIDA, a political subdivision of the State of Florida; PORTER W. HOMER, County Manager; R. K. OVERSTREET, Tax Collector of Metropolitan Dade County, Florida; and FRED O. DICKINSON, JR., as Comptroller of the State of Florida,

*Appellees.*

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**On Appeal from the United States District Court for the Southern District of Florida**

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## APPELLANT'S BRIEF ON THE MERITS[1 & 2]

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[1]All references will be to the *Record* inasmuch as the necessity for printing an Appendix was dispensed with by joint Motion and Order of this Court dated April 19, 1971.

[2]This brief is filed on behalf of one plaintiff only, Nishan Paul, and not on behalf of Florence Diffenderfer of the ACLU.

## OPINION BELOW

The opinion of the three judge United States District Court (Rec. 305-311) is reported at 316 F.Supp. 1116.

## JURISDICTION

This suit was brought under 28 U.S.C. §§1331, 1343, 2201, 2202, and §1983 of 42 U.S.C. to enjoin the governmental tax exemption pertaining to the commercially utilized income producing real property owned by the defendant, Central Baptist Church of Miami, Florida, Incorporated. A three judge United States District Court was convened pursuant to 28 U.S.C. §2281 and §2284. The opinion of the three judge United States District Court was entered on August 21, 1970, and the Final Judgment of the Court in favor of the defendants was entered on October 5, 1970. Notice of Appeal and Amended Notice of Appeal to the Supreme Court of the United States were filed on September 18 and October 7, 1970. Probable jurisdiction was noted by this Court on February 28, 1971, and the time permitted for filing this Brief was extended to and including May 15, 1971. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U.S.C., §1253.

## STATUTE INVOLVED

F.S. 192.06 (3) and (4) as interpreted by **Central Baptist Church of Miami, Florida, Incorporated vs. Dade County, Florida, 216 So.2d 4** (contained in Appellants' Jurisdictional Statement).

## QUESTIONS PRESENTED

A. Do the First and Fourteenth Amendments to the United States Constitution forbid governmental tax exemption to extend to church-owned commercial business enterprises?

(1) Does the tax exemption granted by the defendant, Dade County, Florida, to the defendant, Central Baptist Church of Miami, Florida, on real property utilized six days of each week for commercial profit-making purposes violate the First and Fourteenth Amendments to the U. S. Constitution prohibiting the establishment of religion and protecting the free exercise thereof?

## STATEMENT OF THE CASE

Appellants, who were the plaintiffs below, filed suit in the United States District Court against the defendants, appellees below, as a result of the governmental tax exemption granted to one of the defendants, Central Baptist Church of Miami, Florida, Incorporated, by and through the cooperation of the other defendants as it pertained to certain real property owned by the Central Baptist Church in Dade County, Florida. A Stipulation of Facts (Rec. 129-138) was entered into by the plaintiffs and the defendant Central Baptist Church. The following were included among the stipulated facts:

1. The defendant Central Baptist Church owns real property in Miami, Dade County, Florida which is being utilized six days each week for a commercial profit making purpose as recognized in the opinion of the three judge United States District Court.

2. That the said commercial parking lot occupies approximately fifty-nine percent of the church property.

3. That although this commercial parking lot operation brings in a substantial profit each year, the Dade County governmental authorities pursuant to F.S. 192.06 as interpreted by the Supreme Court of Florida in **Central Baptist Church of Miami, Florida, vs. Dade County, Florida**, 216 So.2d 4, exempted the said commercial parking lot from taxation.

The Final Judgment was entered against the amended complaint (Rec. 214-222) filed by the plaintiffs which had charged violation of the First and Fourteenth Amendments to the United States Constitution by F.S. 192.06 (3) and (4) itself, on its face, and as interpreted, construed, and applied to the plaintiffs and all others similarly situated by the afore-cited Florida Supreme Court decision. Plaintiffs herein also challenge the unconstitutional results obtained through the use of this statute wherein a profit-making commercial parking lot is granted tax exempt status solely as a result of its being owned by the defendant Central Baptist Church. The plaintiffs herein challenge only the commercial operated business, and not the property occupied by the church building itself. Stated another way, the amended complaint was not directed to the forty-one per cent (41%) of the property occupied by the church structures, but rather directed solely to the

remaining fifty-nine per cent (59%) of the church-owned real property maintained as a commercial parking lot six days of each week as stipulated to by the parties and as reflected in the opinion of the three-judge United States District Court. Subsequent to the filing of motions for summary judgment and various briefs filed by the respective parties, the three-judge U. S. District Court entered its opinion (Rec. 305-311) and thereafter its Final Judgment against the plaintiffs as to injunctive and other relief requested by the plaintiffs. Probable jurisdiction by this Court was noted on February 28, 1971.

## SUMMARY OF ARGUMENT

This Court recently held in **Walz vs. Tax Commissioner of the City of New York**, 25 L.Ed.2d 697, 90 S.Ct. 1409 (1970) that real property owned by churches and used exclusively for religious purposes may be exempted from taxation without running afoul of the First Amendment to the United States Constitution. Left open, however, was the question of whether or not commercial businesses owned by religious institutions can also qualify for tax exemption without doing violence to the First Amendment. It can be seen, therefore, that we are confronted with two separate and distinguishable questions. The first has already been answered by the **Walz** decision. Religious institutions can qualify for tax exemption privileges on their property used exclusively for religious purposes. The second question, however, is: Can the various businesses, commercial enterprises and profit-making ventures owned by religious institutions also qualify for tax exemption in light of the prohibition on Established religion? We believe that the protective umbrella of tax exemption should not be permitted to cover the vast and far-flung profit-making commercial enterprises of re-

ligious institutions. Specifically, we are concerned with a parking lot owned by the Central Baptist Church of Miami and utilized six days of each week for a profit-making commercial business. The substantial profit made out of the commercial use of this real estate each year is the reflection of the proficient business operation of this property as a commercial parking lot six days out of seven days every week. As a result of the church ownership of this commercial operation and the cessation of business on Sundays, the church believes that it should properly enjoy an ad valorem tax exemption on the commercial parking lot. We believe that the church's position is untenable constitutionally, unjustifiable morally, and unsustainable logically. We further believe that if religious institutions are permitted to place their commercial businesses within the reasoning of the Walz decision, then, in that event, the establishment clause will have lost all its integrity, the churches most of their vitality, the government some of its sovereignty, and the church leadership all of its respectability.

Unfortunately, there has been a continuous assault on the wall of separation between church and state. Brick by brick, this wall envisioned by Thomas Jefferson and strengthened by James Madison, has been the subject of abuse and violence. Certainly, whatever reasoning can be utilized to sustain tax exemption for religious structures cannot be extended under any circumstances to the commercial businesses owned by churches. What a complete sham and mockery it will be if the public treasury is tapped by resourceful religious institutions stripped of their religious robes and girded by commercial garments. As I understand the Walz decision, the purpose of inserting reference to the decision of Gibbons vs. District of

**Columbia**, 116 U.S. 404 (1886) at the conclusion of the main opinion was to highlight and distinguish church-owned exclusively religious property as opposed to church-owned commercial property. We recognize, of course, that the **Gibbons** decision was not rendered pursuant to the Establishment clause, but rather to a specific statute. Nevertheless, we believe that the Court in **Walz** was indicating a clear dichotomy between what the church uses as religious property as opposed to what the church utilizes for profit-making commercial purposes. In any event, this Court will, by deciding the instant case, either bring the government into partnership with church-owned business ventures or, hopefully, declare that the church and the government are to remain free from the entanglements of the other, which otherwise would surely bring destruction to both.

## ARGUMENT

THE ESTABLISHMENT CLAUSE CONTAINED IN THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND MADE APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT FORBIDS GOVERNMENTAL TAX EXEMPTION TO EXTEND TO CHURCH-OWNED COMMERCIAL BUSINESS ENTERPRISES, AND THAT THE TAX EXEMPTION GRANTED BY THE DEFENDANT, DADE COUNTY, FLORIDA, TO THE DEFENDANT CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA ON REAL PROPERTY UTILIZED SIX DAYS OF EACH WEEK FOR COMMERCIAL PROFIT-MAKING PURPOSES VIOLATES THE AFOREMENTIONED AMENDMENT TO THE UNITED STATES CONSTITUTION.

There are few cases in which the courts are presented with a record as clear-cut as that which is contained in this lawsuit. There is no factual dispute between the parties. The Stipulation of Facts entered into by the parties simplifies this lawsuit to its basic, common and all-pervasive question: whether or not the tax exempt status of the commercially-utilized parking lot owned by the defendant, Central Baptist Church of Miami, Florida, and which is used six days a week for profit-making purposes is in violation of the First and Fourteenth Amendments to the United States Constitution? This issue, of course, was made crystal clear when the Florida Supreme Court in **Central Baptist Church of Miami vs. Dade County, Fla., supra,** reversed the Circuit Court in and for Dade County, Florida, and enjoined the taxing authorities from collection of ad valorem taxes against a commercial parking lot in downtown Miami which is utilized six days a week for profit-making purposes and, in addition, happens to be owned by the Central Baptist Church. This lawsuit was made necessary when the Florida Supreme Court interpreted, construed and applied Florida Statute 192.06 (3) and (4), so as to bring the commercial parking lot within the protective ambit of tax exemption. The United States District Court in Miami upheld the tax exemption on the basis of **Walz vs. Tax Commissioner of The City of New York,** supra, despite the fact that the **Walz** decision involved property used exclusively for religious purposes and the property in the instant case involves property used almost exclusively for commercial purposes. The decision of the U.S. District Court is plainly and obviously opprobrious to the meaning and purpose of the First and Fourteenth Amendments to the United States Constitution forbidding the establishment of religion. In fact, the opinion of the U.S. District Court,

in reality, probably reads the Establishment clause out of the Constitution altogether. The District Court decision stated:

> "Does the holding in Walz vs. Tax Commissioner, supra, that there is no establishment of religion and no inhibition of the free exercise of religion in a state taxation scheme which exempts from taxation property used 'exclusively for religious purposes', i.e., 'religious properties used solely for religious worship'— encompass the tax exemption in the instant case as it applies to church property, used as a commercial parking lot? We answer affirmatively."

Apparently, the Court further extended the Walz decision by stating:

> "In short, there is nothing in the majority opinion in Walz which indicates that a state may not constitutionally construe its religious exemption statute to include church-owned, commercially used property when the proceeds go solely to church projects. Nor do we think that such an inclusion within the tax exemption scheme is arbitrary or capricious. Accordingly, we hold that F.S. 192.06 (4) constitutionally encompasses the fifty-nine per cent of the Central Baptist Church's property utilized six days a week as a commercial parking lot. Plaintiffs' Motion for Summary Judgment is denied, as to the relief sought by Plaintiffs, and judgment will be entered for all the defendants."

It is difficult to imagine any one decision rendered by a Federal court which could so quickly and simply cut out the heart of the Establishment clause. The U.S. District Court recognized the fact that the church owns 127,500 square feet in downtown Miami, and that approximately fifty-nine per cent of this property is utilized for commercial purposes six days of each week. The opinion is candid enough to recognize this fact. Nevertheless, the Court somehow and in some way comes to the conclusion that Walz also stands for the proposition of permitting tax exemption for this 59% of commercial property. We do not challenge the tax exemption for the forty-one per cent of the property utilized for religious purposes. But we are at a loss to understand how Walz can be interpreted to include the commercial businesses of the church, as well.

In fact, if we review the Walz decision, I think it becomes clear that the reasoning applied to church-owned religiously utilized property cannot also be applied to the church's commercial businesses, as well. Chief Justice Burger, in his analysis of the Establishment clause, determined that the legislative purpose of tax exemption in the Walz decision was not aimed at sponsoring or supporting religion; but can this same statement possibly apply when the State also seeks to exempt the commercial businesses of religious institutions? We think not. In addition, the Chief Justice cautions that the end result must not have the effect of an "excessive government entanglement with religion." Yet, as seen by the quotation in this Brief from the U.S. District Court decision, that decision is based, in part, on the apparent use of the profits made from this commercial business. In other words, the Court stated that the exemption is proper

"when the proceeds go solely to church projects." It would be difficult to imagine anything more entangling than for a government agency to go through church records each and every year to follow the course of the net proceeds generated from church businesses. If the government deemed the ultimate recipient as worthy, then, according to the United States Distrit Court decision, the exemption would hold. Apparently, if the agency decided that the ultimate recipient was not worthy, then I suppose the tax exemption woud be lifted. Not only is this excessive entanglement, but it also is degrading both to the government and to the church. Still another example of how the **Walz** Case is not applicable is the reference of the Chief Justice to the decision of **Gibbons vs. District of Columbia,** 116 U.S. 404, 408, 6 Sup.Ct. 427, 429, 29 L.Ed.680 (1886). This case is especially important because the Chief Justice was apparently referring to the substantial difference between religiously utilized property and property used to produce income. In fact, on Page 1417 of the **Walz** decision and referring to **Gibbons,** the Chief Justice stated:

> "In denying tax exemption as to land owned by but not used for the church, but rather to produce income, the Court concluded: . . ."

It is not only the Chief Justice's opinion which reflects the dichotomy between religiously utilized property and income producing property, but the concurring opinions, as well, reflect the distinction which must be made. In Mr. Justice Brennan's concurring opinion, he discusses on Page 1421 that churches use their facilities and personnel to carry on projects which other non-profit organizations would have to do. The discussion includes a statement that:

> "Accordingly, the funds used to maintain the facilities as a place of religious worship and study also maintain them as a place for secular activities beneficial to the community as a whole."

How then can the U.S. District Court in the instant case use the reasoning of Mr. Justice Brennan to apply to the commercial businesses of religious institutions? The reasoning would have no logical connection whatsoever.

Still further, Mr. Justice Brennan, on Page 1420 of the **Walz** decision quotes **Gibbons vs. District of Columbia,** supra, to the effect:

> "We are not disposed to deny that grounds left open around a church, not merely to admit light and air, but also used to add to its beauty and attractiveness, may, **if not used or intended to be used for any other purpose,** be exempt from taxation under the statutes." (Emphasis supplied by this writer.)

The "any other purpose" is clearly seen in the instant case wherein the real property is utilized six days of each week as a commercial business, and only on Sunday as a free parking area.

We also find the reasoning of Mr. Justice Harlan, in his concurring opinion, equally inapplicable to the commercial property of churches. On Page 1426, the footnote states in part:

> "While I would suppose most churches devote part of their resources to secular community projects and conventional charitable activities, it is a question of fact, a fact that would only be relevant if we had before us a statute framed more narrowly to include only 'charities' or a limited class of organizations, and churches. In such a case, depending on the administration of the exemption, it might be that an exemption to religion would turn out to be improper. This would depend, I believe, on what activities the church in fact sponsored."

We could discuss the various "establishment" cases which have come before the U.S. Supreme Court in the last 25 years. We could, in addition, quote various passages from those decisions, but, as the Chief Justice pointed out in the **Walz** decision, reliance on a particular phrase or paragraph may be misleading as to the intent of the Court. Nevertheless, we should like to at least indicate that the reasoning in the following cases is important for purposes of defining acceptable boundaries for the Establishment clause. **Everson vs. Board of Education,** 330 U.S. 1 (1947); **McCollum vs. Board of Education,** 333 U.S. 203 (1948); **Torcaso vs. Watkins,** 367 U.S. 488; **Engel vs. Vitale,** 370 U.S. 421 (1962); **Abington School District vs. Schempp,** 374 U.S. 203 (1963); **Murray vs. Curlett,** 374 U.S. 203 (1963).

At this point, we would like to discuss briefly the three positions taken by the defendant, Central Baptist Church of Miami, to support the tax exempt status they claim. First, the church has, during the course of this litigation, made reference to the financial troubles of the

church and the economic problems incumbent with the administration of their church. Our response to this is that, first and foremost, the constitutionality or unconstitutionality of the issue in this suit does not and cannot depend upon the financial circumstances of the church. We wish the church well in their work, but we cannot accept the justification of tax exemption on the basis that the church will suffer financial difficulties. In addition to this, we point out to the Court that the taxes which rightfully should be paid would come out of substantial profits made each year by this commercial parking lot, and therefore the church is giving nothing but a small portion of the substantial profit made each year. Still further, it would seem that religious institutions are not nearly as impoverished as claimed, as can be seen in **Larson and Lowell, The Churches: Their Riches, Revenues and Immunities** (1969). Therefore, even if the argument concerning the church's financial difficulties was relevant, which it is not, the factual allegations are subject to serious suspicion. Secondly, the church argues that the proceeds of the business go to worthwhile projects. In fact, the U.S. District Court decision is based in part on this conclusion, as can be seen by the quotation from that decision referred to earlier in our Brief. Once again, we do not believe that what the church does with its net profits from its commercial businesses would be relevant or material to the constitutionality or unconstitutionality of tax exemption for those businesses. The exemption will have to stand or fall on its own merit without reference to where the business profits ultimately end up. In addition, certainly the "entanglement" referred to by Chief Justice Burger in the **Walz** decision becomes mammoth in the light of a governmental agency or bureaucrat running through church records each year, to trace the business profits to their

ultimate end. Thirdly, the church argues that the real property is used on Sunday free of charge for its worshippers and therefore the property is as necessary as the roof on the church building itself. We believe this argument to be specious. Even accepting the fact that in downtown Miami parking is difficult, and that parking spaces would be required to service the parishioners, the tax exemption is not necessary even if the parking spaces are required. Nor is it necessary that the property be used commercially for the remainder of the week (six days). Therefore, the use of the parking spaces on Sunday and the claimed tax exemption on the basis that it is a necessary part of aiding the parishioners must fall as hypocritical and illogical.

Since the days of Presidents Jefferson and Madison, this country has been particularly sensitive to the prohibitions well thought out by these two great Presidents. This nation and its courts have recognized that the reasons which lay behind the First Amendment are sound and as alive today as they were in the days of witchcraft burnings and religious persecutors. Presidents Jefferson and Madison well realized what it would mean for a pluralistic society with various religions and denominations as well as non-religionists, to request the aid of government and, in particular, to compete for the tax dollar. At the present time, the United States contains many sects of religious thought and worship. It is probably one of the great strengths of this country that we have cultural diversity and richness provided by various religious faiths and practices. The horror and nightmare of these various faiths competing for the tax dollar and governmental recognition was all too clear to the founders of our nation whose forefathers had fled their European

homes for religious freedom in the Colonies. More currently, the spectacle of religious strife and violence in Northern Ireland amply demonstrates the eventual result of governmentally established religion. Surely, the competition would be greater and the violence more widespread in a society as religiously pluralistic as ours. Rather than prolong this Brief with various references to excellent texts on the subject of separation of church and state, we would choose to close our Brief by simply asserting our belief in the integrity of the Establishment clause and the free exercise clause to the United States Constitution. We believe further that the equal protection clause demands that the taxpayers of Dade County be protected from subsidizing the commercial businesses of religious institutions. If all other business operations, including other parking lot operators, are required to pay taxes, why should a parking lot owned and operated by the Central Baptist Church be any logical exception? What justification can there be for any religious institution to go into the open market and compete with other businesses at a substantial commercial advantage derived from the privilege of lower overhead through a tax exemption? It would seem that elemental fairness would dictate that once the men of the cloth wear the garments of mercantile interests, then their rights, and privileges should be no less and no more than offered to all other businesses. Accordingly, we ask that the justice contained in the very teachingings of this church be dispensed with the righteousness for which this church stands.

## CONCLUSION

For reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

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## PROOF OF SERVICE

I, HOWARD J. HOLLANDER, attorney for the appellant Nishan Paul, says, under oath, that on the _____day of _____, 1971, I caused copies of the foregoing Appellant's Brief on the Merits to be served on the several parties thereto as follows: MERSHON, SAWYER, JOHNSTON, DUNWODY & COLE, 1600 First National Bank Building, Miami, Florida; THOMAS C. BRITTON, Esq. Attention St. Julien P. Rosemond, Dade County Attorney, 1626 Dade County Courthouse, Miami, Florida 33130, and FLORENCE DIFFENDERFER, Co-Plaintiff.

_____

Attorney

## AFFIDAVIT OF SERVICE

I, Don Cornell (Review Printing Co.), Printer for Counsel Howard J. Hollander, say under oath, that on the _____ day of _____, 1971, I served copies of the foregoing Brief on the Merits upon: Mershon, Sawyer, Johnston, Dunwody & Cole, 1600 First National Bank Bldg., Miami, Fla.; Thomas C. Britton, Dade County Atty., 1626 Dade County Courthouse, Miami, Fla., and Florence Diffenderffer, Co-Plaintiff.

_____

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Sworn to and subscribed to before me, at Miami, Florida, this _____ day of _____, 1971.

_____

Notary Public, State of Florida
At Large

My Commission Expires _____